Supreme Court, U. S.
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IN THE

Supreme Court of the United States

October Term, 1978

No. 78-1038

DAVID H. KUBERT,

Petitioner,

vs.

THE SUPREME COURT OF THE COMMONWEALTH OF PENNSYLVANIA,

Respondent.

MOTION FOR LEAVE TO FILE AND PETITION FOR WRIT OF MANDAMUS

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The petitioner as a member of the people of the Commonwealth of Pennsylvania moves the Court for leave to file the petition for a writ of mandamus hereto annexed and further moves that an order and rule be entered and issued directing the Honorable The Supreme Court of the Commonwealth of Pennsylvania to show cause why a writ of mandamus should not be issued to the respondent Honorable The Supreme Court of the Commonwealth of Pennsylvania in accordance with the prayer of the said petition and why your petitioner should not have such other and further relief in the premises as may be just and meet.

DAVID H. KUBERT, Esq.,
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QUESTION AT ISSUE

Question

Is it due process under our system of government for The Supreme Court of Pennsylvania, without any litigation whatsoever pending before it or any other Court in Pennsylvania, to pronounce a State Statute of Pennsylvania unconstitutional?

1. On November 14, 1978, the Honorable The Supreme Court of the Commonwealth of Pennsylvania, Respondent issued a "Letter—Decision" and Order thereon without any litigation being before the said Court and the text of the Letter—Decision and Order are attached hereto as an Appendix.

2. The General Assembly of the Commonwealth of Pennsylvania during May 1978 enacted a statute which was approved by the Governor of the Commonwealth of Pennsylvania being Pamphlet Law 486 No. 175; 42 Pa C.S. Section 1703 known as the Public Agency Open Meeting Law sometimes referred to as the Sunshine Law providing *inter alia* that "The Supreme Court and all other agencies and units of the unified judicial system when exercising the powers to recommend or adopt general rules or other orders in the nature of regulations shall be an agency within the meaning of . . . the Public Agency Open Meeting Law." The Letter—Decision of The Supreme Court of Pennsylvania states that as a consequence of being a "covered agency" under the Open Meeting Law, The Supreme Court (of Pennsylvania) when exercising its ruling making functions, is mandated by the terms of that law to give public notice of its meetings, 65 Pa. C.S. Section 265, and to keep "Open to the public at all times" all of its meetings or hearings . . . at which formal action is scheduled or taken" 65 Pa C.S. Section 262. The Letter—Decision goes on further to say that the Open Meeting Law also provides—in language again made applicable to the judiciary under 42 Pa. C.S. Section 1703—that "no formal action shall be valid unless such formal action is taken during a public meeting," 65 Pa C.S. Section 262 and declares that "any member of any agency who participates in a meeting or a hearing knowing that it is being held or conducted in such a way to intentionally prevent an interested party from attending or with the intent and purpose of violating this act is guilty of a summary offense and upon conviction thereof shall be sentenced to pay a fine not exceeding One Hundred Dollars ($100.00) plus costs of prosecution." 65 Pa. C.S. Section 268." The Supreme Court of Pennsylvania concluded that this legislation of the General Assembly of the Commonwealth of Pennsylvania represented "an intrusion by the legislature

into the essential functioning of a coordinate branch of government, a violation of the separation of powers doctrine on which responsible and responsive government is so critically dependent." The Court concluded that this legislative mandate that the Sunshine Law under Section 1703 applies by its terms to the judicial rule—making function (as distinguished from decision—making function) was unconstitutional.

3. Due Process is guaranteed in the Fourteenth Amendment of the United States Constitution to all the people of each State of our United States. The people of each State speak through their elected General Assembly which among other things in performing its functions enunciates the public policy of the people and their desire as to how to be governed. Due Process may be concisely stated to be fairness.

Due Process was observed in the enactment of the Sunshine Law in Pennsylvania when the people of the Commonwealth spoke through their representatives at the General Assembly, and the people spoke again through their elected governor who approved the said law. It is the General Assembly that sets forth the public policy of the Commonwealth of Pennsylvania and it said that the policy for "Sunshine" applying to the actions contemplated or taken in the exercise of the functions of the three coordinate branches of government—the Executive, the Legislative and the Judicial is the public policy of the Commonwealth of Pennsylvania and as far as the judicial branch of the government is concerned only with activity under the rule-making power as distinguished from the decision-making power of the courts in litigated cases. The people wanted a chance to hear and to be heard in these areas.

4. The crucible of Due Process requires freedom to discuss and present views and opinions of varying kinds on Legislative, Executive and Judicial actions set forth in the Sunshine Law.

5. In the exercise of the decision making of the power of the judiciary, due process consists of the presentation of the views of the party litigants through pleadings, hearings, trials, filing of briefs and arguments thereon. The people of Pennsylvania want like "due process" in all three branches of their republican, democratic form of government, *i.e.*, open hearings, discussion, etc., which has been the American way since the colonial days of our country. Much of the rule-making power of the Courts of Pennsylvania stem from the Legislature granted by the people through their General Assembly by laws approved by the Governor and extended to the Courts and indeed the provisions usually state that the rules thus adopted by the Courts "have the full force and effect of statutes."

6. The respondent, the Honorable The Supreme Court of the Commonwealth of Pennsylvania in an unprecedented action on November 14, 1978 *sua sponte* decided that the Sunshine Law of the people of the Commonwealth of Pennsylvania is unconstitutional as applied to the rule making power of the Court—with no litigation pending before it—no parties—no pleadings—no hearings—no discussion of opposite or other views thus denying to the petitioner a member of the people of Pennsylvania the basic fundamental fairness, which is to say, "due process" as guaranteed to the petitioner by the Fourteenth Amendment of the Constitution of the United States.

> In Marbury vs. Madison, 1 Cranch 137 (1803) Chief Justice Marshall speaking for your Honorable Court never decided that the judicial power to declare a statute unconstitutional existed without litigation pending

before a Court—that is to say, without due process. The power of a Court is to "adjudicate" and there is no adjudication where there is no litigation or controversy before the Court and therefore in such a situation the Court has no power to adjudicate.

7. No appeal can be taken from the said Letter—Decision because no judgment had been rendered—there is no procedure to appeal from such unilateral action by the Supreme Court of Pennsylvania to any higher Court. Such action of the Supreme Court of Pennsylvania arrogates unto itself a power which thwarts the Will of the People of the Commonwealth of Pennsylvania with no right to appeal therefrom—it is an autocratic un-American violation of our basic form of government. Courts do not suddenly *sua sponte* render advisory opinions in ordinary cases—how much more so should they be prevented from doing so in stating, without due process, that the laws adopted by the governed people are unconstitutional and close the door on the decision without the possibility of appeal. Such action smacks of despotism and is unconstitutional and a denial of basic due process to the petitioner herein who acts on behalf of himself and the entire people of the Commonwealth of Pennsylvania.

8. Our only remedy is refuge to the Fourteenth Amendment of the United States Constitution and the Supreme Court of the United States by requesting a writ of mandamus under the grant of jurisdiction to the Supreme Court of the United States by Title 28 United States Code § 1651(a) directed to the Supreme Court of the Commonwealth of Pennsylvania to vacate the "Letter—Decision" made by it on November 14, 1978 and the orders made thereon and directing the said Supreme Court of Pennsylvania to await in an orderly fashion the coming up, if any, of any litigation before the Courts of the Commonwealth of Pennsylvania concerning the constitutionality of the Sunshine Law of Pennsylvania in the usual way with due process attending the proceedings.

9. The petitioner maintains that he is entitled to the protection and the benefits of Section 1 of Article 14 of the United States Constitution wherein it is provided *inter alia* ". . . nor shall any state deprive any person of life, liberty or property, without due process of law. . ." The petitioner contends that the Honorable The Supreme Court of the Commonwealth of Pennsylvania is part of the State of Pennsylvania, being one of the coordinate branches thereof, and that in this connection it has deprived the petitioner of life, liberty or property without due process of law within the meaning of the provisions of the Fourteenth Amendment of the Constitution of the United States. The ruling of the Honorable The Supreme Court of the Commonwealth of Pennsylvania is therefore one that your Honorable The Supreme Court of the United States can and should correct by writ of mandamus.

WHEREFORE, Petitioner prays:

That a writ of mandamus issue from your Honorable Court directed to the respondent the Honorable The Supreme Court of the Commonwealth of Pennsylvania requiring the said respondent to show cause on a day to be fixed by your Honorable Court why mandamus should not issue from this Court directing the said respondent to vacate and expunge from the record its Letter—Decision of November 14, 1978 and the order entered thereupon.

That the petitioner have such additional relief and process as may be necessary and appropriate in the premises.

Respectfully submitted,

DAVID H. KUBERT, Esq.,
Suite 1101,
1315 Walnut Street,
Philadelphia, Pa. 19107,
Phone: 1-215-732-4444.

APPENDIX

The Letter and Order Dated November 14, 1978 was Sent to the Hon. Milton J. Shapp, Governor of Pennsylvania, the Hon. Ernest P. Kline, President of the Senate of Pennsylvania, and the Hon. K. Leroy Irvis, Speaker of the House of Representatives of Pennsylvania.

FULL TEXT

SUNSHINE LAW DOES NOT APPLY TO SUPREME COURT'S RULEMAKING FUNCTION

In a letter accompanying an order amending the Rules of Civil Procedure 51, 52 and 76, the Pennsylvania Supreme Court has agreed unanimously that the Sunshine Law as applied to the rulemaking function of the court is unconstitutional. The letter was addressed to the Hon. Milton J. Shapp, Governor of Pennsylvania, the Hon. Ernest P. Kline, President of the Senate of Pennsylvania, and the Hon. K. Leroy Irvis, Speaker of the House of Representatives of Pennsylvania.

The texts of the letter and order dated November 14, follow:

Gentlemen:

We respectfully submit this direct letter of address as a means of making our views known to you, the representatives of our two coordinate branches of government.[1] We do so in order to convey to you as quickly and as precisely as possible our reasons for not complying with the provisions of the Public Agency Open Meeting Law (P.L. 486, No. 175) in our promulgation on November 14, 1978, of Amendments to Rules of Civil Procedure 51, 52 and 76. See our order of that date, No. 53, Civil Procedural Rules Docket No. 5, copy attached. The submission of this direct letter of address in no

way suggests any departure from firm precedent against rendering of advisory opinions. Neither does this letter signal any weakening in our commitment that the judiciary not unnecessarily intrude in legislative matters. Rather, in this special situation in which we, as an institution, are constrained not to follow an expressed mandate of the General Assembly, we feel it incumbent on ourselves as a matter of deepest respect to our coordinate branches to explain that position as promptly as possible. The alternative course would be to await an adversary challenge to our failure to follow the Open Meeting Law. This approach would risk creating and prolonging unnecessary tension between our branches of government. Accordingly, we have chosen this letter of address by which to articulate our decision.

I

In 1978 the General Assembly explicitly brought the rulemaking functions of the Pennsylvania judicial branch within the scope of the Public Agency Open Meeting Law (P.L. 486, No. 175); the General Assembly provided in a statute now codified at 42 Pa. C.S. § 1703, that "[t]he Supreme Court and all other agencies and units of the unified judicial system when exercising the powers to recommend or adopt general rules or other orders in the nature of regulations shall be an agency within the meaning of . . . the Public Agency Open Meeting Law."[2] As a consequence of being a "covered agency" under the Open Meeting Law, the Supreme Court, when exercising its rule-making functions, is mandated by the terms of that law to give public notice of its meetings, 65 Pa. C.S. § 265, and to keep "open to the public at all times" all of its "meetings or hearings . . . at which formal action is scheduled or taken." 65 Pa. C.S. § 262. As a means of enforcing the public meetings requirement, the Open Meeting

Law also provides—in language again made applicable to the judiciary under 42 Pa. C.S. § 1703—that "[n]o formal action shall be valid unless such formal action is taken during a public meeting," 65 Pa. C.S. § 262, and declares that "[a]ny member of any agency who participates in a meeting or hearing knowing that it is being held or conducted in such a way to intentionally prevent an interested party from attending or with the intent and purpose of violating this act is guilty of a summary offense and upon conviction thereof shall be sentenced to pay a fine not exceeding $100 plus costs of prosecution." 65 Pa. C.S. § 268.

After careful study, it is our conclusion that 42 Pa. C.S. § 1703 is inconsistent with the Pennsylvania Constitution's grant of power to the Supreme Court "to prescribe general rules governing practice, procedure and the conduct of all courts. . . ." Pa. Const., art. V, § 10(c).[3] In making the Open Meeting Law applicable to the judiciary when performing its rule-making tasks, the General Assembly has attempted to exert control over one of the relatively few functions that the Pennsylvania Constitution explicitly assigns to the judicial branch of government. While the General Assembly was unquestionably well intentioned in enacting Section 1703, we are unanimously of the view that the provision represents an intrusion by the legislature into the essential functioning of a coordinate branch of government, a violation of the separation of powers doctrine on which responsible and responsive government is so critically dependent.

II

A

Prior to 1968, the Pennsylvania Constitution contained no explicit grant of rule-making authority to the Supreme Court. While judicial rule-making power may well have been inherent in the constitutional scheme,[4] the explicit grant of rule-making authority to the judiciary came from the General Assembly. See 17 Pa. C.S. § 61.[5] Under this statutory grant the rule-making power of the Supreme Court within covered areas was absolute. As distinguished from the situation in other jurisdictions in which statutory provisions articulated schemes explicitly envisioning joint legislative and judicial activity in rule promulgation, see, e.g., 28 U.S.C. § 2072, the Pennsylvania provision delegated the entire procedural rule-making authority with respect to civil actions to the Supreme Court.[6] The breadth of this delegation is suggested by the closing paragraph of the statute, providing that "[f]rom and after the effective date of any rule promulgated under this Section . . . the operation of any act of Assembly relating to practice or procedure . . . and inconsistent with such rule, shall be suspended insofar as such act may be inconsistent with such rule." 17 Pa. C.S. § 61. Thus, under the statutory provision, procedural rules promulgated by the Supreme Court, without the participation of the legislature, had the full force of law. See *Dombrowski v. City of Philadelphia*, 431 Pa. 199, 245 A.2d 238, 241 (1968).

Given the scope of the statutory grant, the issue as to whether the Supreme Court's rule-making authority was inherent or whether it stemmed solely from 17 Pa. C.S. § 61 was never put to a conclusive test; as long as the power was there, its source was not of great importance. And in 1968 this

already somewhat dormant issue became moot. It was in that year the the Judiciary Article of the Pennsylvania Constitution was altered to grant the Supreme Court in Article V, § 10(c) "the power to prescribe general rules governing practice, procedure and the conduct of all courts." See note 3, *supra*. Section 10(c) further provides, very much like 17 Pa. C.S. § 61, that "[a]ll laws shall be suspended to the extent that they are inconsistent with rules prescibed under [this] provision." While the new Judiciary Article, given the breadth of the grant in 17 Pa. C.S. § 61, may have had only a limited impact on the *extent* of the Supreme Court's rule-making authority, it established the *source* of that authority—that source, after 1968, is unquestionably the Constitution.

Even in the pre-1968 era, an argument could have been made that a statute like 42 Pa. C.S. § 1703 applying the Open Meeting Law to the judiciary would have been unconstitutional. In the post-1968 era, that argument becomes compelling. For once it becomes clear—as it surely is now—that the rule-making power is vested by the Constitution in the judiciary, any legislative intrusion into that power must be viewed with the greatest of skepticism. And an intrusion which threatens members of the Supreme Court with summary offense sanctions simply for conducting their rule-making deliberations in the ways that they have for years in the past conducted them, is serious enough to constitute a violation of the separation of powers doctrine.

B

Notwithstanding the explicit language of Article V, § 10(c), four central arguments might be offered in support of Section 1703's constitutionality. An analysis of such positions exposes their respective weaknesses and demonstrates the absence of a constitutional basis on which Section 1703 might rest.

1. It could be argued that while Article V, § 10(c) does grant rule-making authority to the judiciary, that grant is not exclusive and allows the General Assembly to exercise concurrent power in the area. If the power is concurrent, the argument would proceed, the General Assembly has not exceeded constitutional bounds in enacting Section 1703.

The major response to this argument is that there is simply no substantial support for the proposition that the grant of authority in Article V, § 10(c) is anything other than exclusive. Particularly when the constitutional provision is viewed against the background of its predecessor statute, i.e., 17 Pa. C.S. § 61, which itself delegated such a broad scope of authority to the Supreme Court, it would be anomalous to conclude that Section 10(c) is nothing more than a grant of concurrent power. Moreover, the constitutional provision's explicit statement, see page 4, *supra*, that court-made rules will prevail against any statutes that might be inconsistent with them would be incongruous with a scheme in which the legislature exercised concurrent rule-making power. This Court has noted, "a power does not inhere to the legislature if it has specifically been . . . entrusted to another co-equal branch of government," *Commonwealth v. Sutley*, 474 Pa. 256, 378 A.2d 780, 788 (1977). The United States Court of Appeals for the Third Circuit was correct in concluding that "the Pennsylvania Constitution gives the state's supreme court exclusive power to establish rules of procedure for state courts" and that "the legislature . . . is *without power to control procedure.*" *Garrett v. Bamford*, No. 77-2556, Opinion filed August 11, 1978, Slip Opinion at 6-7 (emphasis added). See also Goodrich-Amram 2d, page 9 (1976).

2. In a somewhat related argument, it could be urged that insofar as it protects the judiciary, the separation of powers doctrine only protects that branch against incursions into its control and conduct of actual pieces of adversary litigation and that the doctrine is inapplicable in situations in which the Supreme Court is exercising "non-judicial" (i.e., rule-making) powers. Adopting this argument, would allow one readily to accept the long line of cases holding that the General Assembly may not impair final judgments, or otherwise interfere with the course of ongoing or completed litigation, see, e.g., *Leahey v. Farrell*, 362 Pa. 52, 66 A.2d 577, 579 (1949), and cases cited therein, while rejecting the proposition that the legislature may not intrude on and effect the rule-making process.

Even if one accepts the notion that certain explicit constitutional powers of the judiciary are "judicial" and others are "non-judicial"[7] there are at least two answers to this argument. First, there is convincing support for the proposition that the rule-making power is "judicial" in nature. Dean Roscoe Pound, for instance, observed that "procedure of courts is something that belongs to the courts rather than to the legislature, whether we look at the subject analytically or historically" and concluded that "if anything was received from England as a part of our institutions, it was that the making of . . . general rules of practice was a *judicial* function." R. Pound, *The Rule-Making Power of the Courts*, 12 A. B. A. J. 599, 601 (1926) (emphasis added).

Secondly, the separation of powers doctrine has historically protected the judiciary against incursions into areas other than its conduct of adversary litigation. Most prominently, it has been recognized for many years that regulating bar admissions and disciplining members of the

bar are as much judicial functions and as protected against legislative incursion as are, for instance, adjudications issued in traditional adversary litigation. As this Court has noted, "The admission of an attorney to practice before a court is a judicial act . . . [and] [a] statute which would constitute an encroachment on that function must be regarded as a vain attempt by the Legislature to exercise a power which it does not possess." *In re Shigon*, 462 Pa. 1, 329 Pa. A.2d 235, 240 n. 14 (1974), and cases cited therein. It is clear, therefore, that the separation of powers doctrine protects more in the judiciary than the conduct of litigation; given the explicit mention of rule-making in the Constitution, it would be unreasonable to conclude that that power does not enjoy the doctrine's protection.

3. Even if one accepts (a) the exclusivity of the judiciary's rule-making power as provided in Article V, § 10(c) of the Constitution, and (b) the applicability of the separation of powers doctrine to the rule-making area, it could be argued that Section 1703 represents no incursion into the judiciary's rule-making authority. Section 1703, it could be urged, does not mandate the promulgation or defeat of any particular rule. Rather, according to this argument, it simply provides a procedure which the Supreme Court must follow in its consideration of proposed rules and, as such, does not intrude on the powers granted the judiciary by Article V, § 10(c).

This argument gives an unjustifiably narrow reading to the Supreme Court's constitutional power to "prescribe general rules governing practice, procedure and the conduct of all courts." At the same time, it substantially underestimates the intrusion represented by Section 1703's making the Open Meeting Law applicable to the courts. In the absence of any language indicating otherwise, there is no reason to think that

the power "to prescribe" rules does not carry with it the power to decide *how* rules are prescribed.[8] If the Constitution's draftsmen had intended to allow the General Assembly to prescribe the method by which the Supreme Court would promulgate rules, one would have expected that they would have explicitly so provided. Without such provision, it is difficult, in light of the language of the Constitutional provision, to find any such implicit legislative power.

Even apart from the language of Section 10(c), a scheme under which the General Assembly has the power to dictate the methods by which the Supreme Court should promulgate rules is inconsistent with much of the policy underlying the separation of powers doctrine. For such power injects the General Assembly in a pervasive and insistent fashion into the carrying out of what the Constitution has explicitly established as a judicial function. Even if one were to ignore the potentially significant relationship between methods of promulgating rules and the rules that finally emerge, the General Assembly's insertion of itself into the structure of the rule-making process in inconsistent with the mandate of the separation of powers doctrine that the judiciary be kept "a separate, distinct and independent entity in government." *Commonwealth v. Sutley*, 474 Pa. 256, 378 A.2d 780, 783 (1977) (quoting from *Commonwealth v. Widovich*, 295 Pa. 311, 145 A. 295, 299 (1929)). Indeed, it is not at all clear that the independence of the

However, the practical immediate effect of Section 1703 is far less important than the principle of the separation of powers and the policies that it represents. In the instant situation what is to be protected is not per se the power of the Supreme Court to carry on its rule-making in a more closed

fashion than judiciary, the preservation of which is one result of the separation of powers doctrine, would be any more compromised by the General Assembly promulgating a single rule in direct violation of Article V, § 10(c), than by the legislative intrusion into the making of *all* rules which is represented by Section 1703.

4. A fourth argument could be made that given the relatively open and participatory fashion in which this Court had promulgated rules prior to the passage of Section 1703,[9] the compulsion of that provision is, as a matter of practical effect, so minor as not to represent a violation of the separation of powers doctrine. Section 1703 mandates but rather the principle that the power to make rules is that of the judiciary and the judiciary alone. Viewed from this perspective, it is understandable how the separation of powers doctrine has been thought to allow and indeed mandate "the court . . . to resist, temperately, though firmly, *any* invasion of its province, whether great or small." *Commonwealth v. Sutley*, 474 Pa. 256, 378 A.2d 780, 783 n. 5(1977) (quoting *DeChastellux v. Fairchild*, 15 Pa. 18, 21 (1850) (emphasis added).

C

Our conclusion that Section 1703 is unconstitutional is reinforced by an examination of developments in other jurisdictions. Both the Nevada and the Michigan Supreme Courts have decided the precise question presented here, i.e., the constitutionality of applying an Open Meeting Law to the judiciary's rule-making functions. Both courts have held such application unconstitutional.[10] In *In Re 1976 Pa. 267*, 400 Mich. 660, 255 N. W. 2d 635 (1977), the Michigan Supreme Court, while recognizing the "laudable goal" in the challeng-

ed statute, 255 N. W. 2d at 637, held that it represented "an impermissible intrusion into the most basic day-to-day exercise of the constitutionally derived judicial powers. . . ." *id.*; the Michigan constitutional scheme is analogous to that in Pennsylvania with an express grant of authority to the Supreme Court to govern the practice and procedure within the courts. *Id.* at 636. In the Nevada litigation, *Goldberg v. Eighth Judicial District Court*, 572 P.2d 521 (1977), the Nevada Supreme Court did not even have an explicit constitutional grant of rule-making authority to the judiciary to apply; nevertheless, relying on what it saw as the judiciary's "inherent powers to administer its affairs . . . which include rulemaking," 572 P.2d at 522, the Court held that the challenged statute "as applied to judicial bodies, is an unconstitutional infringement on the inherent powers of the judiciary which violates the doctrine of separation of powers." *Id.*

Moreover, an analysis of Open Meeting Laws around the country suggests that the applicability of such laws to any part of the judiciary is more the exception than the rule.[11] Indeed, states such as Hawaii, Massachusetts, New Jersey and Washington have thought the matter so important as to include an explicit statement in their Open Meeting Laws that the courts are excluded from coverage.[12] And, perhaps reflecting a concern for separation of powers issues even in the context of a Constitution which does not explicitly grant rule-making authority to the judiciary, the federal government in the Sunshine Act does not include the judiciary within its scope of coverage. See 5 U. S. C. § 522(b),(e).

D

While the separation of powers doctrine does not "contemplate total separation of [the] three . . . branches of Government," *Buckley v. Valeo*, 424 U. S. 1,104 (1976), the existence of appropriate overlap between branches with respect to some functions of government does not mean that such overlap is appropriate with respect to all functions. The Pennsylvania Constitution grants the judiciary—and the judiciary alone—power over rule-making. In enacting Section 1703, the General Assembly has attempted to assume some of that power, but to our minds, the arguments justifying that attempt are inadequate in light of doctrines developed in this and other jurisdictions. We conclude, in sum, that Section 1703 simply cannot be reconciled with the constitutional scheme of the Commonwealth of Pennsylvania.

Respectfully yours,

MICHAEL J. EAGEN
Chief Justice
HENRY X. O'BRIEN
Justice

SAMUEL J. ROBERTS
Justice
THOMAS W. POMEROY, JR.
Justice
ROBERT N. C. NIX, JR.
Justice
LOUIS L. MANDERINO
Justice
ROLF LARSEN
Justice

ORDER

AND NOW, November 14, 1978, Rules of Civil Procedure 51, 52 and 76 are hereby amended to read as follows:

RULE 51. Title and Citation of Rules

All rules adopted by the Supreme Court under the authority [of the Act of June 21, 1937, P. L. 1982, as amended and supplemented, 17 P.S. § 61 et seq., or] of Article V, Section 10(c) of the Constitution of 1968, or of any Act of Assembly, shall be known as the Pennsylvania Rules of Civil Procedure and may be cited as "Pa. R.C.P. No.—."

NOTE: By order dated December 31, 1968 all statutes and rules governing practice and procedure in actions and proceedings in courts of record and courts not of record were continued in force until suspended, revoked or modified pursuant to Article V of the Constitution.

RULE 52. Effective Date of Rules

Each rule adopted by the Supreme Court under the authority [of the Act of June 21, 1937, P. L. 1982, as amended and supplemented, 17 P. S. § 61 et seq., or] of Article V, Section 10(c) of the Constitution of 1968, or of any Act of Assembly, shall become effective upon the date specified by the Supreme Court in promulgating the rule.

RULE 76. Definitions

The following words and phrases when used in any rule promulgated by the Supreme Court under the authority [of the Act of June 21, 1937, P. L. 1982, as amended and supplemented, 17 P.S. § 61 et seq., or] of Article V, Section 10(c) of the Constitution of 1968, or of any Act of Assembly, shall have the following meanings, respectively, unless the context

clearly indicates otherwise or the particular word or phrase is expressly defined in the chapter in which the particular rule is included:

. . .

"general rule," a Rule of Civil Procedure promulgated by the Supreme Court of Pennsylvania under the authority of Article V, Section 10(c) of the Constitution of 1968 or of any Act of Assembly;

. . .

"local rule," a rule of civil procedure promulgated by a court of common pleas;

. . .

"rule," [any] a Rule of Civil Procedure promulgated by the Supreme Court under the authority of [the Act of June 21, 1937, P. L. 1982, as amended and supplemented, 17 P. S. § et seq., or] Article V, Section 10(c) of the Constitution of 1968 or of any Act of Assembly;

. . .

The term "general rule" wherever it appears in the following Rules of Civil Procedure is hereby amended to read "local rule":

Rule 233(a)(2)(c)	Rule 1572(a)
Rule 1009(f)	Rule 2056(b)
Rule 1047(b)	Rule 2082
Rule 1053(d)	Rule 2132(c)
Rule 1064(c)	Rule 2205
Rule 1074(b)(3)	Rule 2232(a)
Rule 1137(c)	Rule 2353(c)
Rule 1504(b)(3)	Rule 2959(b)
Rule 1507	Rule 2985(b)(3)
Rule 1524	Rule 3110(c)
Rule 1530(b)	Rule 3112(c)
Rule 1534(a)	Rule 3128(d)
Rule 1534(b)	Rule 3130
Rule 1566(a)	

The procedures followed in the promulgation of the amendments adopted by this Order, even though not in compliance with the Public Agency Open Meeting Law (P. L. 486, No. 175) are valid. See the Court's letter of address of November 14, 1978, concluding that 42 Pa. C. S. § 1703 is unconstitutional.

This Order is effective immediately upon publication in the Pennsylvania Bulletin.

BY THE COURT:
MICHAEL L. EAGEN
CHIEF JUSTICE

Bracketed portions are deleted.
Underscored portions are added.

EXPLANATORY COMMENT

The enactment of the Judicial Code and Judiciary Act Repealer Act, both effective generally as of June 27, 1978, introduced new terminology into the law government judiciary and judicial procedure, requiring amendment of Rules of Construction 51, 52 and 76 and the various other rules enumerated in the amendment. Specifically, Definitions Section 102 of the Judicial Code, 42 Pa. C. S. § 102, defines "general rule" to mean a rule promulgated by the Supreme Court. The Rules of Civil Procedure use the term "general rule" to mean a rule promulgated by a local court of common pleas. The amendments bring the Rules of Civil Procedure into conformity with the Judicial Code. They are technical in nature and leave procedure and practice unchanged.

Rule 51, Title and Citation of Rules, Rule 52, Effective Date of Rules, and Rule 76, Definitions, also require technical amendment. The reference in those rules to the rule-making Enabling Act of June 21, 1937, P. L. 1982, is deleted since that act has been specifically repealed by the Judiciary Act Repealer Act of 1978. The rule-making power of the Supreme Court is constitutionally derived from Article V, Section 10(c) of the Constitution of 1968 and from its King's Bench power which is specifically preserved by Section 502 of the Judicial Code, 42 Pa. C. S. § 502. In addition, the Judicial Code delegates to the Supreme Court rule-making power in substantive areas not traditionally within the scope of practice and procedure. The amendments to Rules 51, 52 and 76 take recognition of that fact by referring generally to Acts of Assembly. This will encompass the Judicial Code and subsequent amendments thereto.

By Order of the Civil Procedural Rules Committee,

Philip W. Amram,
Chairman

[1] While we know of no occasion on which this Court has employed this procedure in the past, it has been used by courts of other states in appropriate circumstances. See, e.g., *In Re 1976 Pa. 267*, 400 Mich. 660, N. W. 2d 635 (1977).

[2] The provision was enacted as Section 10(19.1) of the Judiciary Act Repealer Act, Act No. 1978-53.

[3] Article V, § 10(c) provides in full as follows:

> "The Supreme Court shall have the power to prescribe general rules governing practice, procedure and the conduct of all courts, justices of the peace and all officers serving process or enforcing orders, judgments or decrees of any court or justice of the peace, including the power to provide for assignment and reassignment of classes of actions or classes of appeals among the several courts as the needs of justice shall require, and for admission to the bar and the administration of all courts and supervision of all officers of the judicial branch, if such rules are consistent with this Constitution and neither abridge, enlarge nor modify the substantive rights of any litigant, nor affect the right of the General Assembly to determine the jurisdiction of any court or justice of the peace, nor suspend nor alter any statute of limitation or repose. All laws shall be suspended to the extent that they are inconsistent with rules prescribed under these provisions."

[4] See Levin and Amsterdam, *Legislative Control Over Judicial Rulemaking: A Problem in Constitutional Revision*, 107 U. Pa. L. Rev. 1, 3 (1958); R. Pound, *The Rulemaking Power of the Courts*, 12 A. B. A. J. 599, 601 (1926).

[5] This legislative grant of power to the Supreme Court was originally made in the Act of June 21, 1937, P.L. 1982, No. 392, and was amended by the Act of March 30, 1939, P.L. 14, and the Act of August 25, 1959, P.L. 751. The grant, codified as 17 Pa. C.S. § 61, was repealed by Section 2 of the Judiciary Act Repealer Act, No. 1978-53. For purposes of convenience, we will refer to the provision, even though repealed, as 17 Pa. C.S. § 61.

[6] The legislative grant, it should be noted, did not apply to "the courts of oyer and terminer to the Orphans' Courts and to criminal matters in the courts of quarter sessions." 17 Pa. C.S. § 61.

[7] Of course, if one concludes that what is a "judicial power" is to be defined by the Constitution and not by an abstract analysis of what functions are peculiarly "judicial" in nature, then, in light of Article V, § 10(c), the rule-making power would clearly be classified as "judicial".

[8] This proposition could be tested by imagining that the Supreme Court promulgated a set of rules explicitly setting forth the procedure by which it would carry out its rule-making responsibilities. It would be difficult to conclude that this set of rules did not appropriately come within the Supreme Court's power under Article V, § 10(c).

[9] Cf. Pa. Rules of Judicial Administration 103, 311.

[10] Perhaps just as significantly, there appear to be no states whose Supreme Courts have upheld the constitutionality of such provisions against a challenge based on the judiciary's rule-making authority.

[11] It is of particular interest that Florida, the state which moved earliest and which is generally regarded as the most progressive in the area of expansive Open Meeting Laws, see Wickham, *Let the Sun Shine In*, 68 N. W. L. Rev. 480, 491 (1973), has itself excluded the judiciary from the scope of its act's coverage. See Fla. Stat. Ann. 286.011, Fla. Op. Att. Gen. 071-32. And the Supreme Court of Florida has suggested that this exclusion is mandated by the separation of powers doctrine. *Canney v. Board of Public Instruction*, 278 So. 2d 260, 262 (1973).

[12] See Hawaii Rev. Laws, § 92-6; Mass. Gen. Laws Ann. ch. 30A, § 11A; N. J. Rev. Stat. 10:4-8; Wash. Rev. Code Ann. § 42.30.020. See also Idaho Code Ann., § 67-2341; Miss. Code Ann. § 25-41-3(a).